MAY, CRUZ

CONSULTORES ***Legal and Environmental Services for Business and Industry Throughout Mexico***

Queretaro, Mexico
June 15, 2005

Mr. Stephen L. Johnson, Administrator
ENVIRONMENTAL PROTECTION AGENCY
1200 Pennsylvania Ave NW
Washington, DC 20460

Re: Transnational Enforcement of CERCLA

Dear Mr. Johnson:

Our firm represents various, large industrial clients in northern Mexico near the U.S. border. These businesses spend millions of dollars to comply with all applicable environmental laws, and employ thousands of people. They are extremely concerned about an imprudent change in U.S. Environmental Protection Agency policy that, in our view, will have a severe and detrimental effect on U.S.-Mexico economic and political relations for years to come.

The shift in policy involves the attempt by the EPA to apply U.S. environmental laws to foreign companies with operations entirely outside of the United States. In a case currently pending appeal in the U.S. Court of Appeals for the Ninth Circuit of an order denying a motion to dismiss issued by the United States District Court for the Eastern District of Washington, a Canadian company with operations entirely within Canada is being sued to force it to comply with an EPA Unilateral Administrative Order under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").

The District Court's ruling marks the first time that a U.S. court has sanctioned the application of CERCLA to a foreign company under circumstances in which the foreign company's alleged conduct occurred entirely on foreign soil, but in which some of the effects were carried into the United States by river flow.

The international implications of the case are made more complex by the fact that the defendant company, Teck Cominco Metals, Ltd., is in full compliance with Canadian environmental laws, and in recent years has spent approximately a billion dollars on environmental protection measures and is now a model of clean industry.

The Teck Cominco case has direct implications for Mexican industry. In various published articles about transboundary enforcement of U.S. environmental laws, EPA officials have indicated an

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interest in pursuing such enforcement both in Canada and Mexico.[1] Although the EPA claims that these statements do not constitute "official policy," the mere issuance of a Unilateral Order against a foreign company, coupled by the fact that the order has not been retracted despite diplomatic protests by the Canadian government, is a clear indication that this administration supports transnational enforcement of U.S. environmental laws.

Such cross-border enforcement would include CERCLA's strict liability aspects despite the fact that the conduct may be entirely legal in the foreign country or that absolutely no negligence is involved. In addition, CERCLA has been interpreted by U.S. courts as applying retroactively to conduct that may have occurred years, sometimes decades, before the statute was passed.[2]

International relations, by their nature, require countries to undertake continuous assessments of policies to determine 1) whether they effectively serve the practical needs of the nation espousing the policy, and 2) whether due respect is given to the sovereign institutions of other countries. Once these first hurdles are crossed, issues of comity and reciprocity will affect the manner in which the particular policy is implemented.

The EPA's policy fails to achieve the practical anti-pollution and contamination cleanup goals of the United States. By going after "deep pockets" for full cleanup costs even though the defendant company may only be a partial contributor to the pollution, the EPA is not encouraging companies to meet their fair responsibilities, but rather to avoid responsibility and fight the EPA's cleanup orders with every resource available to them—or in many cases face bankruptcy if they acquiesce to the EPA's fundamentally inequitable application of the law.

Furthermore, current EPA policy completely disregards the sovereignty of Mexican and Canadian environmental laws and institutions—and in fact attempts to supersede them, which in and of itself is unacceptably jingoistic and violates a basic legal precept contained in established U.S. law that statutes should be construed to avoid unreasonable interference with the sovereignty of other nations. As the U.S. Supreme Court has said, "This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow."[3]

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[1] *See, e.g., EPA Weighs Superfund Authority for Transboundary Contamination*, SUPERFUND REP., Mar. 31 2003; *and, Strengthening U.S.-Mexico Transboundary Environmental Enforcement: Legal Strategies for Preventing the Use of the Border as a Shield Against Liability*, ENVTL. LAW INST., Sept. 2002. (Prepared with the support of the U.S. EPA, Region IX.)

[2] *See, e.g., United States v. Olin Corp.*, 111 AD2d 957.

[3] In *F. Hoffman-La Roche Ltd. v. Empargran S.A.*, 124 S. Ct. 2359, 2366 (2004), the U.S. Supreme Court stated:

> First, this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U. S. 10, 20-22 (1963) (application of National Labor Relations Act to foreign-flag vessels); Romero v. International Terminal Operating Co., 358 U. S. 354, 382-383 (1959) (application of Jones Act in maritime case); Lauritzen v. Larsen, 345 U. S. 571, 578 (1953) (same). This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow. See Restatement (Third) of Foreign Relations Law of the United States §§403(1), 403(2) (1986) (hereinafter Restatement) (limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State); Murray v. Schooner Charming Betsy, 2 Cranch 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate

There is also an aspect of CERCLA that would be manifestly unfair if the law were applied to foreign companies with operations entirely within a foreign country. That aspect involves the "federally permitted release" exception to CERCLA liability.[4] The "federally permitted release" exception includes various compliance permits issued under U.S. federal laws, but no foreign legal compliance authorizations or permits are included in the exception.[5]

In other words, a situation could arise in which a U.S. facility near the Mexican border operating under a federal permit contributes to the contamination of a site inside the United States, but would not be liable under CERCLA if the discharge complies with the federal permit. However, if a Mexican plant operating entirely on the Mexican side of the border, and operating legally and in compliance with all Mexican environmental permits and authorizations required of it, is the source of a lesser amount of the same contaminating materials that by natural forces find their way to the same U.S. site, the Mexican company could be held liable under CERCLA for the entire amount of all remediation undertaken (in some circumstances up to three times the cost as punitive damages), plus damages to natural resources, plus costs of any health studies carried out as the U.S. administration determines necessary, plus interest charges—while the bigger U.S. polluter avoids liability because it has a U.S. federal permit.

It is disingenuous to argue that a foreign defendant company could sue for contribution under CERCLA. Such suits would take place in the United States, not in the company's home country, and would drag on for years, even though the EPA has already assessed full cleanup costs against the foreign company. It is one thing to apply CERCLA's strangling liability provisions against a U.S. polluter, who also has full access to all the benefits and exceptions provided by U.S. law. But it is entirely different to apply CERCLA to foreign companies, whose activities take place entirely outside the United States, and who are law-abiding citizens of their countries. Rather than a fair

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> the law of nations if any other possible construction remains"); Hartford Fire Insurance Co. v. California, 509 U. S. 764, 817 (1993) (Scalia, J., dissenting) (identifying rule of construction as derived from the principle of "prescriptive comity").
>
> This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world.

See also, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §403(2), which determines reasonableness on basis of such factors as connections with regulating nation, harm to that nation's interests, extent to which other nations regulate, and the potential for conflict.

In *F. Hoffman-La Roche Ltd. v. Empargran S.A.*, the Supreme Court continues the analysis cited above, asking in reference to that antitrust case, "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?"

We wonder also why American environmental law should supplant Mexican and Canadian environmental laws, and we find no argument compelling enough to disrupt existing international law.

[4] 42 U.S.C. §9607(j) provides that liability "for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section."

[5] 42 U.S.C. §9601 (10) contains the definition of "federally permitted release."

enforcement of U.S. federal law for the greater public good, the foreign-enforcement policy the EPA is pursuing is more reminiscent of a common mugger who first ties up his victims before beating them.

From the perspective of U.S. foreign policy, an attempt to enforce CERCLA against foreign defendants for operations and conduct entirely inside foreign countries is a recipe for conflict and potential retaliation against U.S. interests. From the perspective of Mexico, it is an outright insult.

Let me make clear that our firm does not defend flagrant polluters. Our firm has considerable experience in working with industry to make this a cleaner world. We will only accept a client company (including U.S. companies operating in Mexico) if it expressly accepts to do what has to be done to comply with all applicable Mexican environmental laws, and if it is not in current compliance, to come into compliance as soon as possible. What Mexican industry needs from the U.S. government are incentives and technical assistance, not a mugging.

The appropriate cleanup of polluted sites, as well as strict measures to prevent pollution, is in everyone's interest. The proper forum for resolving transnational pollution problems is through international diplomacy to use the resources of local law to effect real change. The U.S. administration knows the value of international collaboration and in fact in December signed a declaration with Canada outlining a comprehensive plan to clean up the Great Lakes. That sort of international collaboration takes effort and commitment, and cannot be substituted by taking the easy way out and simply bullying neighbors.

We urge the U.S. administration, and in particular the EPA, to rethink its intended policy of hemispheric statutory hegemony, and to work collaboratively in innovative ways with its neighbors to achieve permanent and real environmental results.

Respectfully yours,

Robert R. May

cc: Ranking Officials in the Unites States, Mexico and Canada

cc: In the United States:

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Secretary of State
Department of State

Mr. John Turner
Assistant Secretary for Oceans and
International Environmental and
Scientific Affairs
Department of State

cc: In Mexico:

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Secretary of Commerce
Department of Commerce

Mr. Theodore Kassinger
Deputy Secretary of Commerce
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Mr. L. John Iani
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Environmental Protection Agency,
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Mr. Wayne Nastri
Regional Administrator
Environmental Protection Agency,
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Mr. Richard Greene
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The Honorable George Allen
United States Senate

The Honorable Max Baucus
United States Senate

The Honorable Joseph R. Biden, Jr.
United States Senate

The Honorable Christopher S. Bond
United States Senate

The Honorable Henry Bonilla
United States House of Representatives

The Honorable Barbara Boxer United States Senate

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United States Senate

The Honorable Norm Coleman
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The Honorable Johnny Isakson
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The Honorable James M. Jeffords
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United States House of Representatives

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cc: In Canada:

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